SERVED: April 8, 1994

NTSB Order No. EA-4123

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. RICHARD A. ROLUND, Respondent.	Docket SE-11858

ORDER DENYING RECONSIDERATION

The Administrator has petitioned for reconsideration of our decision, NTSB Order EA-3991 (October 14, 1993), dismissing his order in this proceeding. Respondent has replied in opposition. We deny the petition.

The Administrator's order suspended respondent's airline transport pilot certificate for 90 days for violations of Federal Aviation Regulations allegedly committed in connection with respondent's operation, as pilot-in-command, of a March 16, 1990 Wings West flight between Visalia and Fresno, CA. According to the Administrator, respondent took off from Visalia under visual flight rules (VFR) when ground visibility was below the 3-mile minimum visibility required by 14 C.F.R. 91.105(d)(1) (now 91.155(d)(1)). In addition, on arrival at Fresno, respondent's (admitted) descent to 2100 feet allegedly deviated from an air traffic control (ATC) instruction to remain at or above 2500

feet, thus violating 14 C.F.R. 91.75(b) (now 91.123(b)).[1]

In dismissing the Administrator's order and reversing the law judge's initial decision, we concluded that, as to departure from Visalia, the Administrator failed in his burden of proving that ground visibility was below the required minimum. We reasoned, when dismissing the § 91.75(b) charge, that respondent had not heard the 2500-foot altitude instruction, that it was not the normal ("pattern") altitude for his aircraft at that location, and that the mistake did not occur as a result of an incomplete readback on respondent's part. We stated:

> Here, respondent had insufficient reason to question non-receipt of an altitude clearance because he knew the pattern altitude for his aircraft was 1800 feet. The best course would have been for Fresno [ATC], in the absence of respondent's readback of the unusual 2500-foot altitude instruction, to have clarified the matter.

NTSB Order EA-3991 at footnote 11.

The Administrator challenges our dismissal of both aspects of his order, arguing that dismissal is contrary to our precedent and inconsistent with aviation safety. We address each regulation separately.

1. Departure from Visalia -- § 91.105(d)(1). The Administrator argues that our decision establishes that this violation cannot be proven using official weather reports, and that such reports are of "negligible" weight. This interpretation overstates the significance of our ruling. Section 91.105(d)(1) cases are, by their nature, very fact-specific. Here, we simply found that the particular evidence in this record did not support a finding that the Administrator had met his burden of proof.

The Administrator admits that this rule did not require respondent to obtain official weather observations. Nor, as we noted in our prior decision, does the rule require that the 3-mile visibility requirement be measured by official weather reports. Contrary to disregarding the official report, as the Administrator alleges (Petition at 6), we fully considered it, along with all the other evidence submitted. The Administrator's real objection to our conclusion is that we did not consider it to be controlling evidence of the weather at the time respondent departed Visalia.[2]

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[1]The Administrator also alleged, as derivative of the other violations, that respondent violated 14 C.F.R. 91.9 (now 91.13(a)).

[2]The Administrator argues that, "if the Board wished to find

The Administrator's primary weather evidence consisted of two official reports: 1 1/2 miles visibility at 5:52 A.M.; and 3 miles visibility at 6:48 A.M., approximately 1/2 hour after respondent's departure. This evidence, however, clearly leaves doubt as to the weather at takeoff, as that weather was changing quickly.[3] If this were the only weather evidence, and even if respondent had offered no rebuttal, we would have been justified in dismissing the charge, for this evidence fails to provide reliable proof as to the weather at takeoff.[4] This is not to say, however, that official weather would not be persuasive evidence of insufficient visibility in a case where the report was more proximate in time to the takeoff.

In addition to his own testimony (on which, contrary to the Administrator's argument, we did not overly rely), respondent offered other evidence undercutting the Administrator's position that there was less than 3 miles visibility at takeoff. We discussed that evidence fully in our decision (id. at footnote 8). Again, the Administrator's disagreement with the weight we gave that evidence does not convince us that our analysis was in error. And, while evidence from the airborne Westcom 380 that, at a time close to respondent's departure, it looked clear all around Visalia may not conclusively prove ground visibility, it adds doubt to the Administrator's allegation.

2. Arrival at Fresno -- § 91.75(b). The Administrator (..continued)
that the official weather report was stale at the time of Respondent's departure because of rapidly changing weather conditions, then that finding needed to be supported by a preponderance of the evidence." We disagree. It is the Administrator's burden to prove his case by a preponderance of the evidence, not respondent's burden to prove himself innocent. The Administrator also states, "The mere fact that the official weather report changed within an hour from IMC (instrument meteorological conditions) to VMC (visual meteorological conditions) does not mean that midway through the reporting period, when Respondent departed, it was above VFR minimums." Petition at 9. We agree. Neither does it mean that it was below VFR minimums.

[3]The weather observer admitted that the weather had cleared up at some unknown time between his two observations.

[4]The Administrator did present other evidence in the form of a communication from another aircraft that took off from Visalia within a short time of respondent's departure. Although the Administrator disagrees with our conclusion that this transmission was too ambiguous to support his contention, he fails to show why our reasons for not relying on it were wrong.

argues that this aspect of our decision establishes questionable new precedent regarding ATC procedures. We disagree. The Administrator views this case as one where a pilot's mistake could have been avoided by a full readback. We do not argue with the Administrator's review of case law holding pilots responsible in those instances, but find the Administrator's citations to cases in which ATC instructions were violated because pilots knowingly abbreviated readbacks not on point. Our decision here was premised on the assumption that respondent did not hear the altitude part of the clearance and, therefore, could not read it back completely or inquire further about what he did not hear.[5]

Given his failure to hear the altitude instruction, and no reason demonstrated by the Administrator for respondent to think that he had missed part of the instructions (and, therefore, be obligated to inquire further), there was nothing he could have done to correct the situation. Instead, because he did not read back the altitude clearance, and because the 2500-foot clearance was apparently not the usual one for this aircraft, we suggested that the controller could have made further inquiry.[6] In making

[5]We stress that there was no showing that respondent's failure to hear the instruction was a result of some carelessness on his part.

We also disagree that our conclusions here are inconsistent with Administrator v. Friesen and Ashcraft, NTSB Order EA-3202 (1990). There, respondents were assumed to have heard the middle of a transmission when they admitted to having heard the beginning and the end. Here, there is no finding (or testimony) that the beginning of the transmission was heard. Administrator v. Baxter, 1 NTSB 1391, 1393 (1972), cited by the Administrator, also is not properly relied on here. Although there we found a strong presumption that information sent as a part of an ongoing communication between ATC and the aircraft was capable of being received in the aircraft, we made no finding of fact that it was, in fact, received, and the discussion is merely dicta.

[6]We continue to believe, as discussed in our prior decision, that a query from ATC would have been consistent with Administrator v. Hinkle and Foster, 5 NTSB 2423 (1987), and with FAA Manual provision 7110.65F ("if altitude, heading, or other items are read back by the pilot, ensure the readback is correct. If incorrect or incomplete, make corrections as appropriate." Emphasis added). The Administrator agrees that a controller should question an incomplete readback (Petition at 18) but sees no reason why ATC should have considered respondent's readback to be incomplete. We continue to disagree. Although the Administrator repeatedly argues that the 2500-foot clearance was normal for this airport, he does not address our finding, equally relevant, that 1800 feet was the normal pattern altitude for this particular aircraft.

this suggestion, we were not assigning blame or fault to ATC. We only find that, in the circumstances, respondent should not be held to have violated an ATC instruction. Further, we see no far-reaching safety implications (Petition at 15) in recognizing, when reviewing the Administrator's orders in light of our governing standard of safety and the public interest, that pilots can miss hearing instructions and that they should not be held to a strict liability standard. Accord Administrator v. Fromuth and Dworak, NTSB Order EA-3816 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration is denied.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above order.